SUPREME COURT, U. S.

No. 363

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In the Supreme Court of the United States

OCTOBER TERM, 1967

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

v.

SOUTHWESTERN CABLE CO., MISSION CABLE TV, INC., PACIFIC VIDEO CABLE CO. AND TRANS-VIDEO CORP.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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We address ourselves to the assertion of both respondents (Southwestern Cable Brief, pp. 11-14, 22-23; Mission Cable *et al.* Brief, pp. 4-5, 9-11) that the only question properly presented here is the Federal Communications Commission's power to issue an interim order temporarily halting the expansion of a CATV system and the further suggestion, advanced by one of the respondents (Southwestern Cable Brief,

p. 15), that the case—viewed as involving only this question—will likely become moot before this Court has occasion to decide it. Neither contention is well founded.

1. Even if it involved only the power of the Commission to enter interim orders, there is no substantial likelihood that this case would become moot prior to a decision by the Court. Taking into account the present posture of the proceeding (*i.e.*, the evidentiary portion of the hearing concluded, with the initial decision in the offing) and the further administrative steps which would afford the parties an opportunity to file exceptions to the examiner's decision and to obtain oral argument,[1] it is the Commission's judgment that no decision by the agency can be anticipated before the end of the Court's 1967 term. See *Newport News Co.* v. *Schauffler*, 303 U.S. 54, 58. And, at all events, the remote risk of an intervening agency decision should not defeat review by this Court of the important questions presented.[2] See *Southern Pacific Terminal Co.* v. *Interstate Commerce Comm'n*, 219 U.S. 498, 514-516. A definitive

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[1] We note also that the parties could seek reconsideration of the Commission's decision, which in turn could well affect the mootness question. See Section 405 of the Communications Act, 47 U.S.C. 405.

[2] The question discussed here, *i.e.*, the Commission's power to issue interim orders maintaining the status quo pending a hearing (Pet. 17-20), would never come before the Court if the risk of an agency determination of the hearing defeats review. That risk is always present with respect to interim action of this nature.

statement of the Commission's power to issue protective orders—action which seems to us "in the best tradition of effective administrative practice" (*Federal Power Comm'n* v. *Tennessee Gas Co.*, 371 U.S. 145, 155)—is urgently needed for the guidance of the courts, the agency and the affected industries.

2. Nor is this the only issue presented. As our petition attempts to show, the decision below raises the broad question of the Commission's jurisdiction to regulate non-microwave CATV systems by *any* procedures and resolves it in direct conflict with the decision of the Court of Appeals for the District of Columbia Circuit in *Buckeye Cablevision, Inc.* v. *Federal Communications Commission*, (Pet. App. D, pp. 67-80). The opinion in this case makes that abundantly clear by repeatedly asserting that the Commission's statutory powers are limited to licensees and do not authorize action against non-licensees (Pet. App. A, p. 28, n. 7; p. 29). Moreover, both the Ninth Circuit and the District of Columbia Circuit have indicated that they construe the present case as deciding the jurisdictional question contrary to *Buckeye*. In a per curiam order issued on September 6, 1967, which transferred an appeal in *Valley Vision, Inc.* v. *Federal Communications Commission*, No. 21,063, (C.A.D.C.) to the Ninth Circuit pursuant to 28 U.S.C. 2112(a), the District of Columbia Circuit stated (Slip. Op., p. 2):

> The Federal Communications Commission has the power to issue cease and desist orders pursuant to § 312 of the Communications Act to en-

join violations of the CATV regulatory scheme. See *Buckeye Cablevision, Inc.* v. *Federal Communications Commission*, —— U.S. App. D.C. ——, —— F. 2d —— (No. 20,274, decided June 30, 1967); *contra*, *Southwestern Cable Co.* v. *United States*, —— F. 2d —— (No. 21,183, 9th Cir., decided April 28, 1967).

And the Ninth Circuit had previously issued an interlocutory injunction staying the effectiveness of the Commission's order that Valley Vision cease and desist from violation of the CATV rules, citing the instant case as sole authority (Pet. 16, n. 12).

Certainly, there can be no doubt of the importance of promptly resolving this conflict; nor is there any arguable claim of probable mootness with respect to this broad question.

Respectfully submitted.

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